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*A complete list of parties and counsel
appears on the signature page per Local Rule
3-4(a)(1)*

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

APPLE INC., CISCO SYSTEMS, INC.,
GOOGLE LLC, INTEL CORPORATION,
EDWARDS LIFESCIENCES
CORPORATION, and EDWARDS
LIFESCIENCES LLC,

Plaintiffs,

v.

ANDREI IANCU, in his official capacity as
Under Secretary of Commerce for Intellectual
Property and Director, United States Patent and
Trademark Office,

Defendant.

Case No. 20-cv-6128-EJD

**PLAINTIFFS' RESPONSE TO
DEFENDANT'S NOTICE OF
SUPPLEMENTAL AUTHORITY**

Date: Under Submission

Judge: Hon. Edward J. Davila

1 The Supreme Court’s recent decision in *TransUnion LLC v. Ramirez*, No. 20-297 (June 25,
2 2021), does not aid the Director. To the extent that decision is relevant, it favors Plaintiffs.

3 *TransUnion* addressed the question of whether the defendant’s alleged violation of a federal
4 statutory right owed to the plaintiffs satisfied the injury-in-fact requirement. Reiterating its prior
5 statement in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), *as revised* (May 24, 2016), the Court
6 “rejected the proposition that ‘a plaintiff automatically satisfies the injury-in-fact requirement
7 whenever a statute grants a person a statutory right and purports to authorize that person to sue to
8 vindicate that right.’” Slip op. at 10 (quoting *Spokeo*, 136 S. Ct. at 1549). Rather, the Court wrote:
9 “Only those plaintiffs who have been concretely harmed by a defendant’s statutory violation” have
10 standing to sue. *Id.* at 11. Accordingly, the Court also reiterated that “bare procedural violations,
11 divorced from any concrete harm ... do[] not suffice for Article III standing.” *Id.* (quoting *Spokeo*,
12 136 S. Ct. at 1549). *TransUnion*’s articulation of controlling principles for evaluating injury in fact
13 thus broke no ground and has no material effect on this case because, as Plaintiffs have explained,
14 they do not rely on an allegation of bare statutory violation but rather have alleged concrete and
15 particularized injuries. See Compl. ¶¶ 52-60; Dkt. 92 at 7-9 (“MTD Opp.”).

16 In fact, *TransUnion*’s application of these principles to the case before it confirms that
17 Plaintiffs here have met the injury-in-fact requirement. Plaintiffs challenge the *NHK-Fintiv* rule,
18 which has been and likely will continue to be applied to foreclose Plaintiffs’ IPR petitions. As
19 alleged in the amended complaint and explained in their opposition to the motion to dismiss,
20 Plaintiffs contend that the *NHK-Fintiv* rule creates “a substantial risk” that their “IPR petitions will be
21 denied” and that Plaintiffs “will thereby be deprived of IPR’s benefits.” MTD Opp. 7; *see also*
22 Compl. ¶¶ 52-60. For standing purposes, then, Plaintiffs are more akin to the “Maine citizen[]”
23 whose “land is polluted by a nearby factory,” not the “plaintiff in Hawaii.” *TransUnion*, slip op. at
24 11. And the Court’s suggestion that courts “assess whether the alleged injury to the plaintiff has a
25 ‘close relationship’ to a harm ‘traditionally’ recognized as providing a basis for a lawsuit,” *id.* at 9
26 (quoting *Spokeo*, 136 S. Ct. at 1549), is satisfied here because, as Plaintiffs have explained, it is well-
27 established that the denial of a chance to obtain a benefit is an injury in fact, *see* MTD Opp. 8.
28 *TransUnion* did not suggest otherwise.

1 Dated: June 28, 2021

Respectfully submitted,

2 By: /s/ Mark D. Selwyn

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ATTORNEY ATTESTATION

I, Mark D. Selwyn, am the ECF User whose ID and password are being used to file this document. In compliance with N.D. Cal. Civil L.R. 5-1(i)(3), I hereby attest that concurrence in the filing of the document has been obtained from each of the other signatories.

By: /s/ Mark D. Selwyn
Mark D. Selwyn

CERTIFICATE OF SERVICE

I hereby certify that on June 28, 2021, I electronically filed the above document with the Clerk of the Court using CM/ECF which will send electronic notification of such filing to all registered counsel.

By: /s/ Mark D. Selwyn
Mark D. Selwyn